

## REMARKS

Applicants respectfully request reconsideration of the instant application in view of the foregoing amendments and the following remarks. Claims 31, 38-41, 55, 61, 65-68 and 115 are currently pending in the instant application. Claims 1-30, 32-37, 42-54, 56-60, 62-64 and 69-114 have been previously cancelled. Claims 31, 38, 40, 41, 55, 65, 67 and 68 have been amended and new claim 115 added by way of this Response. Claims 31, 55, and 115 are of independent form. Applicants submit that support for these amendments and the new claim may be found throughout the specification and originally filed claims, and accordingly no new matter has been added by way of this Response.

### Examiner Interview Summary

Applicants thank the Examiner for taking the time to discuss the above-referenced application on March 31, 2008 and clarifying aspects of the rejection made in the January 28, 2008 Office Action relating to how the cited references are allegedly related to elements of the pending claims. Applicants note that the following discussion is based on additional review of the Office Action, the cited references and the discussed clarifications as best understood.

### Rejection Under 35 USC § 103

Claims 31, 37-41, 55, 61, 64-68 have been rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over McCall et al. US Patent No. 6,321,984 (hereafter "McCall"), in view of Alnwick US Patent Application No. 2002/0007318 (hereafter "Alnwick") and further in view of "Weather futures bet will give Tucson firms a hedge against loss," Arizona Daily Star, Tucson, Arizona, 5 February 1999 (hereafter "Weather Futures"). Applicants respectfully traverse the Examiner's rejections and submit that a *prima facie* case of obviousness has not been

established and that the pending claims are patentably distinct from the cited references, taken alone or in combination, for at least the following reasons.

**I. Applicants submit that a prima facie case of obviousness has not been established**

MPEP § 706.02(j) prescribes that a rejection under 35 U.S.C. § 103 should set forth:

- (i) the relevant teachings of the prior art relied upon,
- (ii) the differences in the claim over the applied references,
- (iii) the proposed modification of the applied references to arrive at the claimed subject matter, and
- (iv) an explanation as to why the claimed invention would have been obvious to one of ordinary skill in the art at the time the invention was made.

Applicants submit that the rejections in the pending Office Action do not establish each of these requirements..

Applicants submit that the rejections in the January 28, 2008 Office Action do not establish the differences in the claim over the applied references by not addressing every claim limitation and by over-generalizing cited references. The MPEP prescribes that, "when evaluating the scope of a claim, *every limitation in the claim must be considered*," [§ 2106 II(C), emphasis added] and, "*All words* in a claim must be considered in judging the patentability of that claim against the prior art." [§ 2143.03, emphasis added].

By way of example only, Applicants note that the pending rejection has cited no reference nor taken Official Notice with respect to the claim limitation "guaranteed program price". The rejection alleges an equivalence between the discount incentives discussed in McCall and the program price limitation of the pending claims. However, Applicants submit that none of McCall the other cited references, or even the pending rejection itself discusses "a guaranteed program price" for fuel as recited in the claim 1, taken in the context of the claim as a

whole. Accordingly, Applicants submit that the pending rejection fails to consider "all words in [the] claim," as required, for example, by MPEP § 2143.03.

Further, Applicants submit that the pending rejections are based on over-generalized applications of the cited references. For example, the Office Action recites, "use of the 'program sponsor data' and 'usage data' to determine the program price," (January 28, 2008 Office Action, p. 5, ¶ 2) when in fact claim 1 recites, "calculating a guaranteed program price ... using customer usage data and said finder's fee amount of said program sponsor data ..." In another example, the rejection characterizes a claim element as, "receiving customer usage data that includes a negotiated quantity of fuel," when in fact claim 1 recites "usage data includes a quantity of fuel to be purchased ..." (January 28, 2008 Office Action, p. 4, ¶ 2) Applicants respectfully request that the Examiner's rejection adhere to the language actually recited in the claims and substantively address all recited claim elements. Otherwise, Applicants cannot be sure if, which, and/or to what claim limitations the rejection is addressing or asserting equivalents towards.

As none of the references cited against the pending claims discuss or render obvious at least a guaranteed program price, Applicants respectfully request withdrawal of this basis for rejection. Should the Examiner disagree and maintain the rejection, Applicants respectfully request additional clarification and specific citation from the cited references for a "guaranteed program price" for vehicle fuel as recited in the context of claim 1 taken as a whole

Furthermore, Applicants submit that the rejection in the January 28, 2008 Office Action has not established why the claimed invention would have been obvious to one of ordinary skill in the art at the time the invention was made by not treating the claims as wholes and by applying impermissible hindsight. MPEP § 2141.02 (I) states, "In determining the

differences between the prior art and the claims, the question under 35 U.S.C. § 103 is not whether the differences themselves would have been obvious, but whether the claimed invention as a whole would have been obvious." [See, MPEP § 2141.02(I); original emphasis]. MPEP § 2106 (II)(C), states *inter alia*: "USPTO personnel may not dissect a claimed invention into discrete elements and then evaluate the elements in isolation. Instead, the claim as a whole must be considered." Applicants submit that the pending rejection asserts over-generalizations that conclude obviousness of the alleged differences in isolation and not in respect to the claim elements recited in each claim taken as a whole. For example, the rejection alleges that, "It would have been obvious to one of ordinary skill in the art at the time the invention was made to use the usage data and the program sponsor 'finder fee' ... to develop a financial hedging strategy to help prevent foreseeable losses..." (p. 7, ¶ 1). Applicants submit that the pending rejection has repeated such isolated assertions of obviousness throughout.

Applicants submit that the pending rejection is based on impermissible hindsight in repeatedly relying on conclusory assertions of obviousness without discussing how the cited references are allegedly modifiable to achieve the claimed subject matter as required by the MPEP. Applicants request clarification of the rejections beyond conclusionary statements including providing an explanation as to why the claimed invention would have been obvious to one of ordinary skill in the art at the time the invention was made. For example, the pending rejection does not provide a single reference citation or invocation of Official notice with respect to any of the dependent claims. The rejection includes only three specific citations to the cited references (two from McCall and one from Alnwick) as allegedly speaking to specific claim elements. Accordingly, Applicants respectfully request withdrawal of this basis for rejection. Should the Examiner disagree, Applicants respectfully request clarification and specific

citations/evidence in the cited art supporting the alleged obviousness of claim limitations in respect to the various claims as wholes, as required by the MPEP.

## **II. The pending claims are patentably distinct from the cited references**

MPEP § 2142 provides that, "If the examiner does not produce a *prima facie* case, the applicant is under no obligation to submit evidence of nonobviousness." Applicants contend that a *prima facie* case of obviousness has not been established for at least the reasons given above. Nevertheless, Applicants have amended claims 31, 38, 40, 41, 55, 65, 67 and 68 and provided the following discussion in an effort to provide clarification of the claim elements, expedite further prosecution, and to more accurately track Applicants' current practices. Applicants maintain that the claims in their original form are not anticipated or rendered obvious by the cited references taken alone or in combination and reserve the right to return to that form and argue patentability at a later time.

With respect to the claimed, "number of months during which the customer is authorized to buy fuel at the customer-specific, fixed guaranteed program price," recited in claim 1, the Office Action cites paragraph 72 of Alnwick, which discusses, "maintained a negotiated minimum sales volume over a negotiated period of time." Applicants submit these two types of time periods are plainly distinct. Should the Examiner disagree, Applicants respectfully request clarification as to how a time period describing an obligation, during which a buyer is contractually required to maintain a minimum sales volume, as discussed in Alnwick, somehow discloses or renders obvious a customer's authorization "to buy fuel at the customer-specific, fixed, guaranteed program price."

Furthermore, Applicants have amended independent claims 31 and 55 to recite, "calculating a customer-specific, fixed, guaranteed program price for a type of vehicle fuel that a customer is authorized to pay for any qualified fuel purchase from any qualified fuel seller," and,

"a number of months during which the customer is authorized to buy fuel at the customer-specific, fixed, guaranteed program price." This contrasts the discount system discussed in McCall, where the price is neither fixed nor customer-specific. Instead, McCall discusses a discount from the retail pump price, which varies with time and with retail location, such as may be based on fluctuations in the price of oil and/or gasoline. According to amended claims 31 and 55, on the other hand, the "customer is authorized to pay" a "customer-specific, fixed, guaranteed program price ... for any qualified fuel purchase from any qualified fuel seller."

Applicants have further amended claims 31 and 55 to recite, "develop a financial hedging strategy to diminish a risk to the program operator in connection with guaranteeing the customer-specific, fixed, guaranteed program price in light of volatility of fuel prices." Counter to the Examiner's assertions, this is different from Weather Futures, in that general aspects of fuel price hedging are discussed, instead of developing financial hedging strategies "to diminish a risk to the program operator in connection with guaranteeing the customer-specific, fixed, guaranteed program price," as recited, for example, in claims 31 and 55. Accordingly, Applicants respectfully request withdrawal of this basis for rejection. Should the Examiner disagree, Applicants respectfully request that clarification as to how the Weather Futures article allegedly renders obvious the claimed "financial hedging strategy to diminish a risk to the program operator in connection with guaranteeing of the customer-specific, fixed, guaranteed program price" within the context of the amended claim, in accordance with the four MPEP requirements discussed above.

Applicants submit that, inasmuch as claims 38-41, 61, and 65-68 directly or indirectly depend from independent claims 1 and 55, they are patentably distinct over the applied

references for at least the reasons given above. Accordingly, Applicants respectfully request withdrawal of rejections of these claims.

### **CONCLUSION**

Consequently, the reference(s) cited by the office action do not result in the claim elements, there was/is no reason, rationale or motivation (i.e., cited references do not teach, read on, suggest, or result in the claimed invention(s)) for such a combination of references, and the claimed inventions are not admitted to be prior art. Thus, the Applicant respectfully submits that the supporting remarks and claimed inventions, claims 31, 38-41, 55, 61, 65-68 and 115 all: overcome all rejections and/or objections as noted in the office action, are patentable over and discriminated from the cited reference(s), and are in a condition for allowance. Furthermore, Applicant believes that the above remarks, which distinguish the claims over the cited reference(s), pertained only to noted claim element portions. These remarks are believed to be sufficient to overcome the prior art. While many other claim elements were not discussed here or in previous amendments/responses, Applicant asserts that all such remaining and not discussed claim elements, all, also are distinguished over the prior art and reserves the opportunity to more particularly remark and distinguish such remaining claim elements at a later time should it become necessary. Further, any remarks that were made in response to an Examiner objection and/or rejection as to any one claim element, and which may have been re-asserted as applying to another Examiner objection and/or rejection as to any other claim element(s), any such re-assertion of remarks is not meant to imply that there is commonality about the structure, functionality, means, operation, and/or scope of any of the claim elements, and no such commonality is admitted as a consequence of any such re-assertion of remarks. As such, Applicant does not concede that any claim elements have been anticipated and/or rendered

obvious by any of the cited reference(s). Accordingly, Applicant respectfully requests allowance, and the reconsideration and withdrawal of the rejection(s) and/or objection(s).

If a telephone conference would facilitate prosecution of this application in any way, the Examiner is invited to contact the undersigned at the number provided.

**AUTHORIZATION**

The Commissioner is hereby authorized to charge any additional fees which may be required for consideration of this Amendment to Deposit Account No. 03-1240, Order No. 17209-075.

In the event that an extension of time is required, or which may be required in addition to that requested in a petition for an extension of time, the Commissioner is requested to grant a petition for that extension of time which is required to make this response timely and is hereby authorized to charge any fee for such an extension of time or credit any overpayment for an extension of time to Deposit Account No. 03-1240, Order No. 17209-075

Respectfully submitted,  
CHADBOURNE & PARKE, L.L.P.

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